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JAMES H. McKENNEY,
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No. 5 Orig.

Motion papers for Respondent.

Filed Oct. 11, 1893.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1893.

THE STATE OF IOWA
vs.
THE STATE OF ILLINOIS.

ORIGINAL SUIT.
IN EQUITY.

MOTION PAPERS ON APPLICATION OF THE STATE OF ILLINOIS,

TO SET ASIDE ORDER
CONFIRMING COMMISSIONERS' REPORT.

M. T. MOLONEY,
ATTORNEY GENERAL OF THE STATE OF ILLINOIS.

A. W. GREEN,
HENRY S. ROBBINS,
OF COUNSEL.

BARNARD & GUNTHORP, PRINTERS, CHICAGO.

IN THE SUPREME COURT OF THE UNITED STATES.

The State of Iowa, }
vs. }
The State of Illinois. }

Now comes the defendant, the State of Illinois, and makes application to the court for leave to move the court to set aside the order entered herein on the tenth day of April, 1893, confirming the report of the commissioners appointed to ascertain and mark the boundary line between the State of Illinois and the State of Iowa, as is more fully stated in the annexed motion. Said application is based upon the petition filed herewith, and the affidavits attached thereto, and the brief filed herewith.

M. T. MOLONEY,
Attorney General, State of Illinois.

A. W. GREEN,
HENRY S. ROBBINS,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES.

The State of Iowa }
vs.
The State of Illinois. }

Now comes the defendant, the State of Illinois, and moves the court to set aside the order entered herein on the tenth day of April, 1893, confirming the report of the commissioners filed on the thirtieth day of March, 1893, wherein said commissioners ascertained and marked the boundary line between the state of Illinois and the state of Iowa at the Keokuk and Hamilton bridge at Keokuk, Iowa, and in support of said motion said defendant, the State of Illinois, files the petition and affidavits hereto annexed, and also the brief filed herewith.

M. T. MOLONEY,
Attorney General of the State of Illinois.

A. W. GREEN,
HENRY S. ROBBINS,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES.

The State of Iowa,
vs.
The State of Illinois.

The defendant, the State of Illinois, respectfully represents to this court that the subject matter of this suit was the ascertainment of the boundary line between the states of Iowa and Illinois; that on January 3, 1893, an interlocutory decree was entered herein, wherein it is ordered, adjudged and declared by this court that the boundary line between the state of Iowa and the state of Illinois is the middle of the main navigable channel of the Mississippi River at the places where the nine bridges mentioned in the pleadings cross said river; and it is further ordered that commissioners be appointed to ascertain and designate at such places the boundary line between the two states, such commissioners consisting of three persons to be named by the court on the suggestion of counsel, and to be required to make a proper examination and to delineate on maps prepared for that purpose the true line as determined by this court, and to report the same to the court for its further action.

This petitioner further shows that on March 6, 1893, a joint request for the appointment of commissioners to fix the boundary line on the Keokuk and Hamilton bridge was presented to this court asking for the appointment of Montgomery Meggs, John R. Carpenter and Albert Wempner as such commissioners; that in pursuance of such joint request an order was entered on March 7, 1893, appointing the above named persons commissioners to locate and mark the boundary line between the said states at the Keokuk and Hamilton bridge, and report at once their action in

that regard before proceeding to ascertain the line or mark the same at the other bridges, and that afterward they determine and mark the said state line at the other eight bridges, as requested by either party, and report the same. That on March 30, 1893, the said commissioners filed their report in writiag in this court, wherein they reported that they had fixed the boundary line between Iowa and Illinois on the Keokuk and Hamilton bridge at Keokuk, Iowa, and that they find that said boundary line is situated one thousand and forty-one and 65/100 feet east of the center of the draw span, and submitted with their report a plat showing their measurements along the bridge; that on April 10, 1893, upon the application of the state of Iowa, an order was entered by this court confirming said report.

Your petitioner further shows that at the time that the joint request for the appointment of commissioners was signed by the Attorney General of Illinois, a change of state officers had just taken place in the state of Illinois, and the said Attorney General, who signed said joint request and who also signs this petition on behalf of the state of Illinois, had been but a few days in office, and was not at all familiar with the proceedings in this cause; that said joint request was presented to him by Mr. George Edmonds, a practicing lawyer of the state of Illinois.

Your petitioner further shows that no notice was ever given to its attorney general, or in any way to the state of Illinois, that the said commissioners had made their said report, or that an application would be made to this court to confirm any report of said commissioners; that not until after the final adjournment of this court at its last term did the attorney general of the state learn that a re-

port had been made by the said commissioners, and that said report had been confirmed.

Your petitioner further represents that the said commissioners either must have wilfully disregarded the decision and the interlocutory decree of this court, or have totally misunderstood the same. That by their report the commissioners marked the boundary line between the two states at a point midway between the west bank of the river and the east bank of the river; that this fixes the boundary line substantially at the place contended for by the State of Iowa; that the State of Iowa claimed that the middle of the main body of water of said river was the boundary line irrespective of where the navigable channel or channel of commerce might be; that the State of Illinois claimed that the boundary line was the middle of the main navigable channel, which was and is the channel of commerce. The decision of this court, after considering both contentions, decided that the controlling consideration is that which preserves to each state the right of navigation on the river, and that therefore the boundary line is the middle of the main navigable channel and in its interlocutory decree declared that the boundary line between the State of Iowa and the State of Illinois is the middle of the main navigable channel of the Mississippi River.

This petitioner further states that the main navigable channel of the Mississippi River, as appears from the affidavits hereto attached, is near the Iowa shore; that the west line of such channel is near where the pivot pier of said Keokuk and Hamilton bridge now stands, and the said channel extends eastward a distance of about four hundred feet; and that the middle of that channel is, under the decision of this court, the boundary line between the two states; that this line is at least eight hundred feet west of the

line as fixed by the said commissioners; that at the point fixed by said commissioners the river is not navigable, and never has been navigable in the ordinary stage of water for vessels engaged in the carrying trade upon said river, nor in fact has the portion of said river, east of the portion of the said river above mentioned as the navigable channel thereof, been a part of the navigable channel of the river nor used by said vessels for the purposes of navigation, as more fully appears by the affidavits hereto annexed.

Wherefore your petitioner, the State of Illinois, prays that the said order of April 10th, 1893, confirming the report of said commissioners, may be set aside, and that new commissioners may be appointed to mark said boundary line in accordance with the decision of this court, or, that this cause be referred to some Circuit Court of the United States or a Master in Chancery thereof to take proof in regard to the main navigable channel of the Mississippi River and the middle line thereof, and report the same to this court.

And your petitioner will ever pray, etc.

M. T. Moloney,

Attorney General of State of Illinois.

A. W. Green.

Henry S. Robbins.

Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES.

The State of Iowa, }
vs.
The State of Illinois. }

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

J. L. Miller, being duly sworn, doth depose and say as follows:

I am, and for four years last past, have been a practicing lawyer in the state of Illinois, residing and practicing in the city of Hamilton, in Hancock County, in the said state of Illinois; that in 1891 litigation arose between the Keokuk and Hamilton Bridge Company on the one side, and the City of Hamilton, the Township of Montebello, in said Hancock County, and School District Number Three of said Township, in regard to the assessment made on property of the Bridge Company, in said municipal corporations, for the purposes of taxation, and I was employed by such corporations to assist on their behalf in such litigation. The main question in such litigation was the same question that is made by the pleadings in this suit, namely, the location of the boundary line between the state of Illinois and the state of Iowa. The first suit was a suit brought by a stockholder of the Bridge Company against John W. Bertschi, County Treasurer and ex-officio Collector of Hancock County, and William L. Guthrie, Assessor of Montebello Township, to restrain the collection of the taxes of 1890, the main allegation in the bill being that the Township Assessor had assessed property of the Bridge Company in the state of Iowa, the contention being that the boundary line was

midway between the shores, and the Township authorities claiming that the boundry line was the middle of the channel of commerce, which was many hundred feet west of the center line between shores. That bill was dismissed.

Shortly thereafter, the Keokuk and Hamilton Bridge Company filed another bill against the same parties, in the Circuit Court of Hancock County, for an injunction, making the same claim as to the boundary line, and the defendants making the same defense. A temporary injunction was granted as prayed for in the bill by the Judge of the Circuit Court. From the order granting such injunction an appeal was prayed to the Appellate Court of the State of Illinois for the Third District, and upon that hearing a decision was rendered reversing the order for an injunction and holding in accordance with the contention of the Township authorities, a copy of which opinion is hereto annexed.

In all that litigation the counsel for the Bridge Company was Mr. George Edmonds, a practicing lawyer of the state of Illinois.

In regard to this suit, I have made inquiries in regard to its institution and conduct, with the following result: I have made inquiries of Mr. James C. Davis, whose name is signed to the original bill in this case as counsel, and have learned from him that he was employed in the case by Mr. Edmonds, and that he was paid for his services by the Keokuk and Hamilton Bridge Company, and that he understood the expenses of the suit, including the payment of the commissioners who were appointed to fix the boundary line by the order of this court, were paid by the Bridge Company. I also made inquiries of Mr. John Y.

Stone, Attorney General of the State of Iowa, whose name is signed to the bill, and learned from him that he knew nothing about the case, except that he filed the bill and the answer, and I was told by Mr. Stone that none of the expenses of the suit had been paid by the State of Iowa.

In looking over the record of this case, I have ascertained that a motion was made on March 30, 1893, by the State of Iowa to confirm the report of the commissioners appointed to determine and mark the boundary line between the states of Iowa and Illinois on the Mississippi River at the Keokuk and Hamilton bridge, and that said motion appears to be signed by J. H. Cole and Walter I. Hayes as attorneys for plaintiff; that J. H. Cole is and for some years last past has been the superintendent of the Keokuk and Hamilton Bridge Company.

I have also learned from other sources that the compensation and expenses of the commissioners to fix the boundary line were paid by the Keokuk and Hamilton Bridge Company.

In the above mentioned suit in the state court, Albert Wempner made an affidavit, a certified copy of which is hereto annexed, the original being on file in the office of the clerk of the Circuit Court of Hancock County, and he is the same Albert Wempner who was one of the commissioners appointed to fix the boundary line, and who signed the report as one of such commissioners fixing the boundary line which is a part of the record in this case.

On September 5, 1893, I met John R. Carpenter, one of the commissioners appointed by this court to mark the boundary line between the two states, and had a conversation with him. In that conversation said Carpenter

stated that under the decision of this court the middle of the navigable channel was not the boundary line, that while the commissioners could not be very certain what the court meant by its decision, they decided that the boundary line should be the middle of the main arm of the river without any reference to the portion thereof that was used as the channel of navigation. He also informed me that the Keokuk and Hamilton Bridge Company had paid the expenses of the commissioners.

J. L. MILLER.

Subscribed and sworn to before me this 21st day of September, A. D. 1893.

[SEAL.] JENNIE MULLEN,
Notary Public,
Cook County, Ill.

STATE OF ILLINOIS. APPELLATE COURT—THIRD DISTRICT.

At an Appellate Court, begun and held for the Third District of the State of Illinois, at Springfield, on the Third Tuesday in November, A. D. 1891.

Present:

Hon. GEO. W. WALL, *Presiding Justice.*
Hon. GEO. W. PLEASANT, *Justice.*
Hon. CARROLL C. BOGGS, *Justice.*

To wit: On the 3d day of December, A. D. 1891, there was filed in the office of the Clerk of said Court an opinion of said Court, in the words and figures following:

John W. Bertschi, Treasurer, &c., and William L. Guthrie, Assessor, &c.,
Appellants,
vs.
The Keokuk & Hamilton Bridge Company,
Appellee.
} *Appeal from Hancock.*

STATE OF ILLINOIS, APPELLATE COURT, THIRD DISTRICT. MAY TERM, 1891, FILED.

John W. Bertschi, County Treasurer, and *ex officio* Collector of Hancock County, and William L. Guthrie, Assessor of Montebello Township.
Appellants,
vs.
The Keokuk and Hamilton Bridge Company,
Appellee.
} *Appeal from Hancock.*

PLEASANTS, J.:

This is an appeal from an interlocutory order granting an injunction against the collection of the taxes for the year 1890, levied for state, county and other purposes, upon appellee's bridge across the Mississippi river between the cities of Hamilton, Illinois, and Keokuk, Iowa.

Appellee questions the jurisdiction of this court on the ground that the case relates to revenue.

That such is its character is clear from *Potwin* v. *Johnston*, 106, Ill., 532, and *Herhold* v. *City of Chicago*, *ibid.*, 547; and section 88 of the Practice Act declares that in such cases, among others there mentioned, the appeal "shall be taken "directly to the Supreme court." The jurisdiction of this

court is appellate only, and until July 1, 1887, could be exercised only upon "final judgments, orders or decrees." This is so expressed in all the statutory provisions defining its jurisdiction, except the section above referred to. That section however is to be taken in connection with Sec. 67 as containing the exceptions therein referred to, and since the rule stated in Sec. 67 relates to final orders only, so must the exceptions stated in Sec. 88. But the act of June 14, 1887, conferred upon the Appellate courts jurisdiction on appeal from "an *interlocutory* "order or decree entered in *any* suit pending in any court "in this state granting an injunction." Thus, if the order is "interlocutory" and grants an injunction, the jurisdiction is plainly conferred, whatever may be the character of the "suit" or case.

It is further said that this act is unconstitutional, but no reason is suggested in support of that proposition, nor do we see any ground on which its validity can be held to be really in question.

Upon the merits the bill claims that the assessment was fraudulently made excessive and that a large part of the property included in it was fixed in the State of Iowa. The description was of "all the lands of The Keokuk and "Hamilton Bridge Company situated in Hancock county, "Illinois, and lying and being in and on Island No. 4, in "the south-west quarter of section thirty (30), in town-"ship five (5) north, range eight (8), west, in said "county, and extending westwardly into the Mississippi "river to the state line between the States of Illinois and "Iowa and more particularly described as follows, viz: "a strip of land eighty feet wide, more or less, the center "line of said strip of land commencing at a point in the "center of Railroad avenue in the plat of ground known

"as the Keokuk and Hamilton Ferry and Manufacturing "Company's Addition to the city of Hamilton, in said "county, 707¾ feet south, 72 degrees 40′ east of the "center of the east end of said bridge, thence running "north 72 degrees 40′ west to the east end of said bridge, "thence continuing the same course along the center line "of said bridge to the State line between the states of Illi- "nois and Iowa, including the slope walls, embankments, "abutments, piers and bridge structure and improvements "thereon, in Sec. 30, T. 5, R. 8." It was assessed by the town assessor at $95,000, which the Board of Equalization reduced to $92,150, and the taxes extended thereon amounted to $3,087.02.

The bill avers that the bridge was completed in June, 1871; that the fair cash value of all that part of it situated in Illinois was not on May 1, 1890, nor has been since, over $60,000, and that the assessment included at least 716 feet, and as complainant believes, over 900 feet of it in Iowa. Affidavits were filed in support of the bill, and not directly contradicted, setting forth the actual cost of portions of the bridge and estimates of the cost in 1890 of other portions, and of steel bridges which tended to show that the part in Illinois, of the same kind, or of steel, and of considerably greater strength, could have been constructed in 1890 for $90,000, and others to the effect that real estate in the town of Montebello was generally assessed at one-third of its estimated cash value or less.

But as the Supreme court say in *Pacific Hotel Co.* v. *Lieb*, 83 Ill., 609, "the value of property is a matter of "opinion, upon which different minds, with equal oppor- "tunities of knowledge and actuated by the same honest "desire to arrive at the truth, are liable widely to differ."

This is especially true where, as in that case and here, the property is used in connection with a franchise which is practically a monopoly. It may be out of all proportion to its cost, and not ascertainable by comparison with other property because of its peculiar character. It is averred in the answer under oath and not denied, that the bridge company has a capital stock of $1,000,000, and a large bonded indebtedness, and that the bridge with its appurtenances is substantially all the tangible property it owns or ever did own. What income it yields complainant has not seen fit to show. It appears that appellant Guthrie was the Township Assessor from 1882 to 1885, inclusive, and in each of those four years assessed this same property, including what is now claimed to be in Iowa, at $125,000. The bill in effect admits that the part conceded to be in Illinois is worth $60,000, and avers that the part assessed which is claimed to be in Iowa, is the most valuable part of the structure, excepting the draw, but does not state its value. This part may be a third or half of the bridge proper, and for aught that is averred may be worth "over" $35,000; and unless it appears that Guthrie knew or believed it was in Iowa, the alleged excessiveness of the assessment, as bearing upon the question of its honesty, is to be considered upon the assumption that it was in Illinois. The assessments of 1882 and 1884 were raised by the Board of Equalization to $126,250; that of 1883, was reduced to $120,000; and that of 1885, to $116,250. Those of 1886-7-8, not shown, were equalized respectively at $117,500, $112,500 and $115,000. Neither of these assessments was objected to by the Bridge Company, and the taxes extended on them as equalized, were paid in full without complaint. It is not

claimed that this acquiescence estops objection to the assessment here in question, but it certainly tends to show that the complainant did not think those previously made fraudulent or grossly excessive, and did think all the property included was in Illinois, or else that the part now conceded to be in Illinois, was properly so assessed. Still, further, the assessment here in question was objected to by the company's agent before the town board of review, and again before the board of supervisors; and those boards after hearing him fully—the one unanimously and the other with only two members dissenting—refused to reduce it. The effect of this action, as evidence, is met with the simple averment that these boards also in thus refusing acted fraudulently.

If, upon all this evidence, it should be conceded that the assessment was at all excessive, we cannot think it so clearly and grossly so as of itself to show fraud. The charge of fraud, based upon that ground, allows too little for honest differences of opinion, includes too many persons presumably honest and sensible, and apparently without any appreciable interest to commit or approve it, and confesses too much unexplained indifference of complainant for a series of years to alleged rights and interests which were hardly less clear and important then than now. Such concession would therefore be of no avail in this proceeding.

For it is settled that mere excessiveness of an assessment will not authorize a court of chancery to interfere with it. The power to assess is given to the assessor. In exercising it he acts judicially, and his honest misjudgment can be corrected only by the town board of review if the assessment is made before the fourth Monday of June, or by the board of supervisors, if made after

that date. *Porter* v. *Railroad Co.*, 76 Ill., 595; *Ottawa Glass Co.* v. *McCaleb*, 81 *id.*, 560; *People* v. *Big Muddy Iron Co.*, 89 *id.*, 116; *Gage* v. *Evans*, 90 *id.*, 569; *Buttenuth* v. *St. Louis Bridge Co.*, 123 *id.*, 540. These cases and others cited in them, hold that the overvaluation, to warrant the interference of chancery, must be fraudulent.

In *Connecting Ry. Co.* v. *The People*, 119 Ill., 184, the refusal by the court below of an offer to prove it fraudulent by the mere fact and degree of its excessiveness was approved, and the general rule applied, "that "fraud being a conclusion of law, it is therefore incum-"bent on the party who would set it up to state the facts "relied upon as constituting it."

While the posibility of a valuation so grossly out of the way as thereby to show it could not have been honest has been recognized, *City of Chicago* v. *Burtice*, 24, Ill., 489; *Pacific Hotel Co.* v. *Lieb*, and *Gage* v. *Evans*, *supra*, the actual occurrence of such seems to be unknown to the courts.

Besides those going to show that this assessment was excessive, the only facts alleged as tending to show it was fraudulently made so are, (1) that while Guthrie was assessing the property of the town the agent of the company stated to him the condition, length and value of said bridge in Illinois as including less than 1,100 feet, and exhibited to him sales of quite a number of parcels of real estate in the town of Montebello as showing its value, and that the assessment of the same was less than one-third of such value; (2) that the assessors of the several towns in Hancock County, at their meeting held on April 30, 1889, agreed to assess real estate at eight per cent. less than it was assessed in 1889, and that the bridge was as-

sessed in that year at $75,000; (3) that said Guthrie assessed the bridge to the east end of the draw, but refused to make his description so show, and (4) that he knew the east end of the draw was many feet west of the state line.

It is not denied that he assessed the bridge to the east end of the draw, nor that other real estate in the town generally was assessed at no more than one third of its fair cash value.

But whether the sales referred to in the first of these averments were for cash, or on what terms, does not appear; nor does the value of complainant's land, exclusive of the improvements, nor the aggregate value and assessment of real estate in the town.

The bridge may have been assessed in a larger proportion to its fair cash value than were a dozen or twenty other parcels of real estate selected, and yet in no larger than that of the aggregate assessment to the aggregate value of such property in the town. Guthrie denies under oath that the alleged statements and exhibits were made to him before the meeting of the town board of review on the fourth Monday in June, 1890, but admits they were then made to that board and afterwards to the supervisors. But if made to him before the assessment was returned, he may for reasons already suggested and possibly others, have differed in opinion from the agent as widely as their figures show in respect to the value of this property. He swears he assessed it at what he believed to be its fair value in comparison with the assessment of other property in the township, and with the aggregate assessment, and though he may have erred in judgment, we see nothing in this averment or the proof relating to it—considered in connection with

the opposing circumstances mentioned—to induce the belief that he acted with a fraudulent purpose.

As to his alleged disregard of the agreement stated of Apl. 30, 1890, the proof is that this property was assessed by the township assessor in 1889 at $115,000, and that the town board of review refused to reduce it, but that the board of supervisors did assume to change it to $75,000, though without any authority so to do, since the assessment was made before the fourth Monday of June. *Coolbaugh* v. *Huck*, 86 Ill., p. 605, and cases cited *supra*. From the action of the town and county officers in 1890, we think the fair inference is that they all understood the agreement of April 30, to refer to the assessment of 1889 as made by the township assessor, and with that understanding Guthrie fully complied by reducing the amount from $115,000 to $95,000.

The good faith of his description of the property assessed as extending "to the state line" instead of the east draw, would seem to be sufficiently shown by the fact that it was the same that was used in each of the years from 1882 to 1888, inclusive. What it was in the assessment of 1889, when objection was first made by the company, does not appear. We, therefore, presume it was still the same. Nor was it shown that Guthrie was asked to change it in 1890. That request was made of the board of supervisors.

There is no evidence in the record tending to show that Guthrie understood or supposed the state line was east of the east end of the draw. The exact location of that line was matter of opinion. It was not distinctly visible, nor were the data from which it was to be ascertained agreed on. Complainant with the same means of knowledge, shows itself uncertain of it by two hundred feet or more,

and is, therefore, hardly in condition to charge that the assessor knew it.

But if it is now ascertained to be in fact east of the draw, then, whether the assessor was or was not honest in assuming it to be where he did, his assessment of what was between that line and the draw was unauthorized, and the collection of the taxes extended thereon should, for that reason, he enjoined.

Where, then, is that line? The Act of Congress of Apl. 18, 1818, to enable the People of the Territory of Illinois to form a state, prescribed for its western boundary a line "along the middle of that river"—the Mississippi—and each of the state constitutions since adopted described it in the same language. It must, therefore, be presumed that the people accepted that boundary as Congress intended it. What, then, did Congress mean by "the middle of the river"?

A river, as defined by Webster, is "a large stream of "water flowing in a channel on land towards the ocean, a "lake, or another river," a definition which makes the the river one stream of water, and consequently the channel one strip of land. This is true of them as to their course in general, and where it is so, the middle of the river would doubtless be the line midway between the water lines at the ordinary stage on the opposite shores. But rivers are in fact, at some points, for short distances, separated into two or more streams, and thence while the river remains one, each stream has its separate channel, for a channel, according to the same lexicographer, is "the bed of a stream."

Now, whatever the rule of municipal law applicable to riparian owners may declare to be the middle of the river

at such points, it seems to be settled by the international rule that as to states having for a common boundary a navigable river, it is not the line midway between the main shores, but a line along the middle of the main one of these channels; and that is held to be the one best adapted and mainly used for navigation—the channel of commerce. It is obvious that no other line as a boundary would certainly secure to either state the right to any valuable use of the river for purposes of commerce, since the channel of commerce would fail to reach it, or would often cross and recross it. Nor would any other channel be a continuous channel. The reasonable presumption is that neither state would intend to concede to the other the exclusive right to use that channel, and upon that presumption the rule is founded, as is agreed by all the writers on international law. Wheaton, Sec. 200; Creasy, Sec. 231; 1 Hallack, Sec. 23, cited by counsel, and *Butternutt* v. *St. Louis Bridge Co.*, 123 Ill., 535, citing further, Field, Polson and Woolsey.

The Mississippi is such a river. At Hamilton, where the bridge crosses it, the continuity of its water surface at the ordinary stage was broken by Island No. 4. That part of the river which flowed between the island and the main shore in Illinois was not navigable for vessels generally at that stage; but that passage was, nevertheless, one of the channels at that point, and the island was within the general bed of the river. According to the showing of the bill, the distance from the main shore in Illinois to the west shore of the island, is 808 feet; from the west shore of the island to the Illinois abutment, 750 feet; thence to the Iowa abutment, 2,192 feet, and thence to the main shore in Iowa, 250, making in all, from main shore to main shore, 4,000 feet. The draw extends from

the Iowa abutment east 380 feet. The assessment to the east end of the draw then included 1,370 feet of the bridge west of the line midway between the main shores, 966 feet west of the line midway between the island and the Iowa shore, and 716 feet west of the line midway between the abutments; and if either of these midway lines is "the middle of the river" in the sense of the enabling act, it included a very considerable portion of the bridge that was in Iowa. No mention is made of a channel of commerce, nor is the bill positive as to which of the last two lines mentioned is the boundary, but avers that complainant believes the assessment included over 900 feet of the bridge in Iowa, and counsel in argument say: "On "the part of appellee it is claimed that the authorities of "Illinois can only tax said bridge to the state line, the "middle of the main river, between the Iowa shore and "the Illinois shore on Island No. 4." This claim seems to concede that the true line is not the middle of the river as a whole. "The main river" is not a strictly accurate expression, since there is only one; and we understand counsel to intend by it the main stream, and by that the one in which the largest of the parts of the river so divided flows, the test of mainness being not depth nor width, but quantity of water of unbroken surface.

If each of the beds in which the several unbroken streams at Hamilton respectively flow is to be regarded as only one channel, then the one between the island and the main shore in Iowa is certainly the main one, and in a general sense each is a channel, for each and the whole of each is the general bed of a stream which is unbroken at its surface, and, therefore, one stream. But a channel, in a more special if not a truer sense, may consist of only a part of such a bed. Webster's definition of it is

"the bed of a stream of water, especially the deeper part "of a river or bay where the main current flows." This distinction between the general bed and the channel is fully recognized by law writers and judges, to some of whom reference has already been made. In Angell on Water Courses, as cited for appellee (Sec. 10, Note 2), it is said that in ascertaining the thread of the river, and thereby the rights of riparian owners, "it will be proper "to take the middle line between the shores upon each "side without regard to the channel or lowest and deepest "part of the stream." See, also, Sec. 101 a. In *Bridge Co.* v. *County of Dubuque*, 55 Iowa, 558, it is said that "the word channel, when employed in treating subjects "connected with the navigation of rivers, indicates the "line of the deep water which vessels follow"; and in *Butternutt* v. *St. Louis Bridge Co.*, 123 Ill., 547-8, our own Supreme court declared this to be "a very accurate "definition of the word 'channel' as commonly used by "rivermen." And Wheaton says (Sec. 202, page 301), "The channel of the Mississippi was remarkably wind-"ing, crossing and recrossing perpetually from one side "to the other of the general bed of the river."

It is shown here that this channel, between Hamilton and Keokuk, was wholly west of the middle line between the main shores or between the island and the Iowa shore; that its west line was about where the pivot pier now stands and its width was about 350 feet, which would place the east end of the draw east of its middle line, and clearly in Illinois, if that line is the boundary. The only change in this channel since the bridge was built is its extension westward to the Iowa abutment, which was made by blasting and removing the rock-bed. No part of the river east of it was ever used as a channel by vessels engaged in the carrying trade.

Thus the line claimed by appellee to be "the middle of "the river," and therefore the boundary of the State of Illinois, would place the whole of the only navigable channel outside of that state and within the coterminous State of Iowa.

It is thought that the history and use of this phrase—"the middle of the Mississippi"—throws some light upon the meaning of Congress by it in the enabling act.

France was the first owner, by appropriation, of the Mississippi and all the territory of its tributaries. By the treaty of Paris of 1763, France ceded to Great Britain all her territory east of that river and north of the Iberville, and the two powers fixed the boundary between them by a line drawn along "the middle of the river Misis-"sippi." Being independent states, to whom the right to use the river for all the purposes of commerce, was of like importance, and which neither would get by the adoption of any other line, the presumption would be according to the authorities cited that they intended the middle line of the channel of commerce. November 30, 1782, Great Britain ceded to the United States all the territory thus acquired north of the thirty-first degree of north latitude, bounded on the west "by a line drawn "along the middle of the Mississippi river," and ratified the cession by the Treaty of Peace of September 30, 1783. This government must be presumed to have known the understanding between Great Britain and France in respect to the boundary, and by the use of the same language to describe it, to have accepted the territory with that understanding. It was also interested, like its grantor, equally with the coterminous state in the navigable use of the river. It must therefore have intended to

obtain, and understood it did obtain, half of the navigable channel without regard to any other middle line.

In 1798 Congress established the Territory of Mississippi, bounding it "on the west of the Mississippi," and in 1817 it was admitted into the Union as a state, with its west boundary "up the Mississippi river:" but Congress did not mean by that language to change the boundary as fixed between France and Great Britain, and between Great Britain and the United States. By "the river," was meant a line along the middle of the river.

Morgan & Harrison v. *Reading*, 3 Sm. and Marshall, 366.

In fixing the eastern boundary of Missouri the enabling act of March 6, 1820, used more definite terms—a line "down and following the course of the Mississippi in the "middle of the main channel thereof." That Congress here meant by "the middle of the main channel thereof," the same thing that it meant by "the middle of the river" is clearly evident from its use of the latter description in the enabling act for Illinois—the eastern boundary of Missouri by one description, and the western boundary of Illinois by the other being for a long distance the same. The east line of Iowa, also a coterminous state, is described like that of Missouri, and the west line of Wisconsin is a line "down the center of the main channel "of that river to the northwest corner of the State of Il- "linois"—which certainly places that corner in the center or middle of the main channel; and the main channel, for all the purposes of this case, was the channel of commerce.

Such appear to be the reasoning and conclusion of the Supreme Court in the Buttenuth case, 123 Ill., 535.

By several early acts of Congress, the equal right of every state of the Union, and of all the people of each to navigate every river within the United States was fully secured. And hence it is said the reason for the rule of international law that makes the line along the middle of the channel of commerce the boundary between independent states does not exist here.

But the claim here made of that line is not upon that reason. It is based upon acts of Congress, ratified by the People of the states concerned. If those acts, properly construed, declare that line to be the boundary, then, whatever may have been the reason for them, they establish it by their own force; and the rule referred to may have decisive effect as a fact in aid of their construction. A boundary line between the lands bordering east and west on the river was established by independent powers that then owned them, and were foreign to each other, before the United States acquired title to any of them. The international rule applied to the powers, and construed their description of that boundary to mean the line so claimed. After the United States, with notice of the line so established, acquired the title, Congress authorized the formation of states out of the lands, with a common boundary line between them, indicated by precisely the same description. From these facts, what other inference should be drawn than that Congress thereby intended precisely the same line. It would be as clearly ascertainable, as fixed, and, on the whole, as fair to the coterminous states as any other that has been suggested, and we see no reason that should have influenced Congress to change it.

We get no light upon this question from any of the decisions of the State or Federal Courts declaring the

boundary of these bordering states to be "the middle of "the river." That is a proposition which all sides alike profess to accept, but with different constructions. Whatever might be our view of it, if it were before us as an original question, we feel bound by those expressed in the Butternutt case, *supra*. Having considered with care all the suggestions of appellee's counsel with reference to its scope and effect as a decision, we cannot but regard it as conclusive upon us.

The evidence in the record fails to show that the middle line of the channel of commerce where the bridge crossed it was east of the east end of the draw.

For the reasons thus stated we are of opinion that the injunction should not have been granted. The order of the Circuit Court granting it will, therefore, be reversed and the cause remanded.

Reversed and remanded.

I, Geo. W. Jones, clerk of said Appellate Court, do hereby certify the foregoing to be a true copy of the opinion of said court in said cause, as the same appears from the records and files in my office.

In testimony whereof, I hereunto set my hand and the seal of said court, at Springfield, this seventh day of December, 1891.

GEO. W. JONES,
Clerk Appellate Court.

Seal of the Appellate Court, Third District. State of Illinois, July 1, 1877.

In the Circuit Court of Hancock County, Illinois.

Keokuk & Hamilton Bridge Company,
Complainants,
vs.
John W. Bertschi, County Treasurer and Ex-Officio Collector of Hancock County, Ill., and William M. Guthrie, Assessor of the Town of Montebello,
Defendants.
} *Affidavit.*

State of Iowa, } ss.
Lee County. }

Albert Wempner, being first duly sworn, doth depose and say that he is a resident of Keokuk, Iowa, and has been engaged as Master and Pilot of steamboats on the Mississippi River most of the time since the year 1852; that he is entirely familiar with the Mississippi River at and near the city of Keokuk, Iowa, and was for many years prior to the building of the Keokuk and Hamilton bridge at that point; that before the building of said bridge the only channel in said river at or near the place crossed by said bridge along which vessels in the carrying trade did or could pass, was near the Iowa shore, the west line of said channel being where the pivot pier of said bridge now stands, and the east line of said channel at a point between three hundred and four hundred feet east of where said pier now stands; that the above described channel was the only channel at this point that could be or was used for the purpose of commerce on said river, the water east of said channel being too shallow in an ordinary

stage of water to be used by vessels engaged in the carrying trade; that the only change in said channel at said point, since said bridge was built, was made by artificial means, by blasting and removing the rock bed of the river and extending said channel westward to the west abutment of said bridge.

In witness whereof I have hereunto set my hand this 25th day of April, A. D. 1891.

ALBERT WEMPNER.

Subscribed and sworn to before me this 25th day of April, A. D. 1891.

ALANSON L. PARSONS,

[L. S.] *Notary Public in and for Lee County, Iowa.*

STATE OF ILLINOIS, } ss.
HANCOCK COUNTY. }

I, Thomas F. Dunn, clerk of the Circuit court within and for said county, in the state aforesaid, do hereby certify that the above and foregoing is a true copy of a certain affidavit made by Albert Wempner in a certain cause pending in said court wherein the Keokuk and Hamilton Bridge Company are complainants and John W. Bertschi, County Treasurer, etc., *et al.*, are defendants, and filed in said cause on May 4, 1891, as the same appears from the files in said cause now in my office remaining.

Witness my hand and the seal of said court at my office In the city of Carthage, in said county this 21st A. D. 1893.

[SEAL.] THOS. F. DUNN,
Clerk.

IN THE SUPREME COURT OF THE UNITED STATES.

The State of Iowa, }
vs.
The State of Illinois. }

STATE OF IOWA, }
COUNTY OF LEE. } ss.

I, James W. Campbell, a licensed pilot, being duly sworn, do depose and and say as follows: I reside at Fort Madison, Iowa, and have resided there since 1863.

I have been familiar with the channel of the Mississippi River at Keokuk, Iowa, since 1831. Seven years of my early life was spent in an Indian canoe paddling up and down the shores at Keokuk during the summer months, and from this association I learned to be a pilot over the Rapids and on the upper Mississippi River, and have followed the said occupation from 1844 to 1871. Immediately above and below where the Keokuk and Hamilton bridge now terminates on the Iowa shore, the channel of the Mississippi river hugs the shore in a curvature line or course, and is from 4 to 600 feet wide. Outside of this distance on the east a boat is liable to strike rocks in several places in low water. I was on the steamer Tempest, and she struck these patches in March, 1847.

The Eliza Steward also grounded upon them in 1847 about 400 feet east of Iowa shore, about one hundred and fifty yards below where the Keokuk and Hamilton bridge now terminates on Iowa shore, and the steamer Dominion sank upon a rock about 600 feet east of Iowa shore near the crossing of the present Keokuk and Hamilton bridge in 1846 or '47. And I am positive there never was a regular or continuous channel, east of line 4 to 600

feet from the Iowa shore at or near where the Keokuk and Hamilton bridge now crosses the river.

J. W. CAMPBELL.

Subscribed and sworn to before me this 19th day of September, A. D. 1893.

[SEAL.] W. C. MARSH,

Notary Public in and for Lee County, Iowa.

IN THE SUPREME COURT OF THE UNITED STATES.

The State of Iowa }
vs. }
The State of Illinois. }

State of Missouri, }
County of St. Louis. } ss.

I, Thomas B. McMath, being duly sworn, do depose and say as follows: I am a resident of the city of St. Louis, Missouri; I am a civil engineer, and have been for the past ten years, and am president of the R. E. McMath Surveying Company of St. Louis, Missouri.

On September 13, 1893, I made soundings of the Mississippi River at the place where the Keokuk and Hamilton bridge crosses that river, in order to ascertain the depth of water therein. These soundings were made and located as follows: Beginning at the west face of the east abutment of the bridge distances of fifty feet were measured along the hand-rail on the north side of the bridge, and from the points so located plumb lines were dropped and the soundings were taken from a boat at the plumb; at the time the soundings were made the water in the river was four-tenths of a foot above low-water mark. The plat annexed hereto was made by me,

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and shows correctly a cross section of the Mississippi River at the Keokuk and Hamilton bridge from the east to the west abutment of said bridge, and the points at which the soundings were made; and the figures in red thereon show the depth of water at the points indicated. The point marked on said plat as "Commissioners mark" is the point at which the commissioners appointed in this suit to fix the boundary line between the states of Iowa and Illinois fixed such boundary line. In making such soundings I was assisted by William H. Glazebrooks and Mark Blackmore.

THOMAS B. MCMATH.

Subscribed and sworn to before me, this 20th day of September, A. D. 1893.

My term expires April 7, 1897.

JOS. A. WHERRY,

Notary Public, City of St. Louis, Missouri.

[SEAL.]

IN THE SUPREME COURT OF THE UNITED STATES.

The State of Iowa
vs.
The State of Illinois.

STATE OF ILLINOIS,
COUNTY OF HANCOCK. } ss.

We, William H. Glazebrook and Mark Blackmore, being severally duly sworn, do depose and say as follows:

On September 13, 1893, we assisted Thomas B. McMath in making soundings of the Mississippi river at the place where the Keokuk and Hamilton bridge crosses that river, in order to ascertain the depth of water therein; the statement contained in the preceding affidavit of Thomas B. McMath in regard to the manner of making such soundings is true, and the statements in said affidavit in regard to the plat annexed to his affidavit are also true.

WILLIAM H. GLAZEBROOK,
MARK BLACKMORE.

Subscribed and sworn to before me, this 22d day of September, A. D. 1893.

R. R. WALLACE.

[SEAL.] *Notary Public in and for County of Hancock. State of Illinois.*

IN THE SUPREME COURT OF THE UNITED STATES.

The State of Iowa
vs.
The State of Illinois.

STATE OF ILLINOIS,
COUNTY OF ADAMS. } ss.

I, H. S. Brown, being duly sworn, do depose and say that I have been engaged in river improvements since 1856; I have examined the bottom of the Mississipp River at the point now spanned by the Keokuk and Hamilton bridge from shore to shore, during extreme low water in the winter season when the almost entire bottom can be seen; that the deepest water was, at that time, at a point about two hundred and fifty feet from the Iowa shore line. Prior to the building of the Keokuk and Hamilton bridge, steamboats passed in or near said water; that portion of the river at said point near the Iowa shore is the only portion of said river which can be used by steamboats in passing up and down, when said river is at a low stage of water. The Hamilton slough was never, in my time, navigable for steamboats except in very high water, and was never used as a channel of the river.

H. S. Brown.

Subscribed and sworn to before me, this 19th day of September, A. D. 1893.

WM. G. FEIGENSPAN,
Notary Public, Adams County, State of Illinois.
[SEAL.]

IN THE SUPREME COURT OF THE UNITED STATES.

The State of Iowa,
vs.
The State of Illinois.

STATE OF IOWA,
COUNTY OF VAN BUREN. } ss.

I, Robert Farris, being duly sworn, do depose and say that I am a resident of Van Buren County, Iowa, and am sixty-six years of age; for thirty-seven years I was engaged in the business of a pilot on the Mississippi river, and was most of that time engaged in piloting steamboats over the Des Moines Rapids from Montrose, Iowa, to Keokuk, Iowa; during the time the Keokuk and Hamilton bridge was building, and for many years prior to that time, I was constantly engaged in piloting steamboats from Montrose to Keokuk, passing that part of the river now spanned by the Keokuk and Hamilton bridge almost daily during the boating season; I am familiar with the Mississippi river at this point, and have been for the past thirty-seven years, and before the Keokuk and Hamilton bridge was built, the navigable channel originally used, and along which vessels in the carrying trade passed, was near the Iowa shore; the west line of said channel was where the pivot pier of said bridge now stands, and the east line at a point not exceeding four hundred feet east of where said pivot pier now stands; the above described channel was the only channel in said river at this place where vessels engaged in the carrying trade could pass.

ROBT. FARRIS.

Subscribed and sworn to by Robert Farris, before me, this 20th day of September, A. D. 1893.

[SEAL.] W. D. MCCORMICK,
Notary Public in and for Van Buren County, Iowa.

IN THE SUPREME COURT OF THE UNITED STATES.

The State of Iowa
vs.
The State of Illinois.

STATE OF IOWA,
COUNTY OF LEE. } ss.

I, R. S. Owen, being duly sworn, do depose and say that I am a resident of Lee county, Iowa, and am sixty years of age; that for thirty-nine years I was engaged in the business of a pilot on the Mississippi River, and was most of that time engaged in piloting steamboats over the DesMoines Rapids, from Montrose, Iowa, to Keokuk, Iowa; during the time the Keokuk and Hamilton bridge was building, and for many years prior to that time, I was constantly engaged in piloting steamboats from Montrose to Keokuk, passing that part of the river now spanned by the Keokuk and Hamilton bridge constantly during the boating season; I am familiar with the Mississippi River at this point, and have been for the past thirty-nine years and before the Keokuk and Hamilton bridge was built, the navigable channel originally used and along which vessels in the carrying trade passed was near the Iowa shore; the west line of said channel was where the pivot pier of said bridge now stands, and the east line at a point not exceeding four hundred feet east of where said pivot pier now stands; the above described channel was the only channel in said river at this place where vessels engaged in the carrying trade could pass.

R. S. OWEN.

Subscribed and sworn to before me, this 19th day of September, A. D. 1893.

WASHINGTON GALLAND,
[SEAL.] *Notary Public for Lee County, Iowa.*

IN THE SUPREME COURT OF THE UNITED STATES.

The State of Iowa,
vs.
The State of Illinois.

STATE OF ILLINOIS,
COUNTY OF HANCOCK. } ss.

I, George C. Waggonner, being duly sworn, do depose and say that I am fifty-four years of age, a resident of Hancock county, Illinois, and by profession a pilot. For thirty-two years last past I have been engaged in piloting steamboats on the Mississippi River between St. Louis and St. Paul, except the years 1861 to 1865, while serving in the United States Navy on the lower Mississippi. During my thirty-two years service as pilot I have frequently —nearly every season—navigated boats on the Mississippi River at Keokuk, Iowa, at the point now spanned by the Keokuk and Hamilton bridge, and I am entirely familiar with the Mississippi River at said point, and have been for the thirty-two years last past. Prior to the building of the bridge across the Mississippi River between Hamilton, Illinois, and Keokuk, Iowa, the navigable channel of said river at and near that point, which vessels followed in passing up and down the river was a space commencing where the pivot pier now stands and extending eastward not more than three hundred feet; within that space the boats and other vessels going up and down passed, and such space was and still is the main channel of said river, and the only channel along which vessels engaged in the carrying trade could or do pass; the portion of said river east of said main channel, was and still is shallow, except in certain seasons of high water, and was never capable of being used for general purposes of navigation.

I am familiar with Hamilton Slough, and have been for the thirty-two years last past; said Slough is not navigable and has not been during that time, except in extreme high water; before the railroad bridge was built across said Slough it was wholly impassable at a low stage of water for steamboats of ordinary draft, and at the present time at a low stage of water there is no running water in said Slough.

On September 4, 1893, I had a conversation with Albert Wempner, one of the commissioners appointed by this court to fix the boundary line, and he told me that in fixing the boundary he did not consider that the channel used by boats had anything to do with the matter.

GEORGE C. WAGGONNER,
Licensed Master and Pilot.

Subscribed and sworn to before me, this eighteenth day of September, A. D. 1893.

[SEAL.] R. R. WALLACE,
Notary Public in and for County of Hancock State of Illinois.

Brief & Arg. [illegible]

Brief of Moloney for [illegible]

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Filed October, 1893.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1893.

THE STATE OF IOWA
vs.
THE STATE OF ILLINOIS.

ORIGINAL SUIT.
IN EQUITY.

BRIEF OF THE STATE OF ILLINOIS ON MOTION TO SET ASIDE ORDER CONFIRMING COMMISSIONERS' REPORT.

M. T. MOLONEY,
Attorney General of the State of Illinois.

A. W. GREELEY,
HERRICK & ROBBINS,
Of Counsel.

[illegible]

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1893.

THE STATE OF IOWA		ORIGINAL SUIT.
vs.		
THE STATE OF ILLINOIS.		IN EQUITY.

BRIEF OF THE STATE OF ILLINOIS ON MOTION TO SET ASIDE ORDER CONFIRMING COMMISSIONERS' REPORT.

This is an original suit in equity instituted in this court to determine the boundary line between the states of Iowa and Illinois. This Court decided that the boundary line was the middle of the main navigable channel of the Mississippi River. Commissioners were appointed to mark this boundary line. At the last term of this Court a report was filed by the commissioners, in which they reported that they had fixed the boundary line on the Keokuk and Hamilton bridge at Keokuk, Iowa, and found the same to be at a point which they marked upon a plat accompanying the report. The report was confirmed by this Court upon the application of the State of Iowa; but no

notice was given by the State of Iowa to the State of Illinois of the application to confirm this report. The State of Illinois now comes and moves the Court to set aside this order of confirmation.

In order to determine whether this motion is well founded, it will be necessary to make a short statement of the record in this case, and also of the contents of the papers on which the motion is based.

The original bill filed by the State of Iowa alleges that the State of Illinois and its several municipalities bordering on the Mississippi River in assessing the bridges crossing the river, claim that the boundary line is "the middle of the steamboat channel or channel of said river usually traversed by steam or other crafts in carrying the commerce of said river, regardless of whether said channel is east or west of the middle of the main bed or arm of said river;" that the State of Iowa claims that the said boundary line is the middle of the main-arm or bed of the river, from shore to shore. The bridge to which particular reference is made in the bill is the bridge of the Keokuk and Hamilton Bridge Company across said river from Keokuk, Iowa, to Hamilton, Illinois; and the bill alleges that the middle of the steamboat channel would be, were it not for the bridge, and was before said bridge was located, 300 feet east of the east end of the draw in said bridge, or 880 feet from the Iowa shore of said river and 2162 feet from the shore of said river in Illinois on Island Number Four; that the authorities in Illinois assess and tax as in Illinois this bridge from the west shore of said island to the east end of the draw and to a point 941 feet west of the middle of the main bed of said river at that point, while the State of Iowa taxes said bridge to the middle thereof between the east and west abutments,

thereby treating for convenience of taxation the middle of said bridge between abutments as the middle of said river at that point, but really 225 feet less than one-half of the distance across the main arm or bed of said river at that point.

The answer of the State of Illinois denies that the boundary line between the two states is the middle of the bed of said river, but insists that it is the middle of the steamboat channel, the channel most commonly used by boats in carrying the commerce of said river; and admits that the State of Illinois, and the municipalities in that state, claim the right to and do tax the bridges and other structures in said river to the middle of such steamboat channel or channel of commerce, and do assess the Keokuk and Hamilton bridge to the draw, and considerably west of the middle of the main arm or bed of said river.

A cross-bill was also filed by the State of Illinois in which the same claim as to the boundary line is made, as is made in the answer, and also alleging that there are nine bridges across said river between the said states, and asks to have the boundary line fixed at each of these bridges.

An answer was filed to the cross-bill which makes substantially the same issue as is made by the original bill and answer thereto.

It is alleged, both in the original bill and in the cross-bill, that litigation is pending over the taxation of the Keokuk and Hamilton bridge.

The question, therefore, submitted to this Court for its decision was whether the boundary line between these two states is the middle of the main body of water measuring from shore to shore, or whether it is the middle of

the main navigable channel, which is the channel of commerce usually followed by vessels engaged in the carrying trade.

This Court, after stating the pleadings, says:

"When a navigable river constitutes the boundary between two independent states, the line defining the point at which the jurisdiction of the two separates is well established to be the middle of the main channel of the stream. The interest of each state in the navigation of the river admits of no other line. The preservation by each of its equal right in the navigation of the stream is the subject of paramount interest."

The Court quotes from writers on International Law upon the subject of the boundary line between adjoining states, and then says:

"The middle of the channel of a navigable river between independent states is taken as the true boundary line from the obvious reason that *the right of navigation* is presumed to be common to both, in the absence of a special convention between the neighboring states, or long use of a different line equivalent to such a convention. * * * The reason and necessity of the rule of international law as to the mid-channel being the true boundary line of a navigable river, separating independent states, may not be as cogent in this country where neighboring states are under the same general government, as in Europe, yet the same rule will be held to obtain unless changed by statute or usage of so great a length of time as to have acquired the force of law."

This court also points out that this boundary line was first established at the time that independent governments owned on either shore of the Mississippi River.

Two decisions of state courts are referred to in the opinion; one decision was by the Supreme court of Iowa in *Dunleith and Dubuque Bridge Company* v. *The County of Dubuque*, 55 Iowa, 558, which held that the boundary line between these two states was middle of the bed of

the river, over which the water flows from bank to bank; the other decision referred to was by the Supreme court of Illinois in *Buttenuth* v. *St. Louis Bridge Company*, 123 Ill., 535, wherein that court, in defining the middle of the Mississippi river, observes: that the word "channel" is used as indicating "the space within which ships can and "usually do pass," and holds that it is in this sense the expressions "middle of the river," "middle of the main "channel," "mid-channel," "middle thread of the chan- "nel," are used in enabling acts of Congress and in state constitutions establishing state boundaries, on the ground that it is the free navigation of the river—when such river constitutes a common boundary, that part on which boats can and do pass, sometimes called "nature's pathway,"—that States demand shall be secured to them.

These two decisions, therefore, presented quite clearly the question to be determined by this court; the Supreme Court of Iowa deciding that the channel of navigation had no bearing upon the matter, but that the boundary line must be fixed, irrespective of any question of the navigable channel, at a point midway between the two shores; while the Supreme Court of Illinois decided that the navigable channel or channel of commerce was all important in the matter, and that the boundary line must be fixed at the middle of such channel of commerce, on the ground that in that way only could be preserved to each state equality in the right of navigation of the river.

This Court then says:

"The opinions in both these cases are able, and present in the strongest terms the different views as to the line of jurisdiction between neighboring states separated by a navigable stream; but we are of opinion that the controlling consideration in this matter is *that which preserves to each state equality in the right of navigation in the*

river. We, therefore, hold, in accordance with this view, that the true line in navigable rivers between the states of the union which separates the jurisdiction of one from another is the middle of the main channel of the river. Thus the jurisdiction of each state exists to the thread of the stream—that is, to the 'mid-channel,' and if there be several channels, to the middle of the principal one, or, *rather, the one usually followed.*

"It is therefore ordered, adjudged and declared that the boundary line between the State of Iowa and the State of Illinois is the middle of the main navigable channel of the Mississippi river."

On January 3, 1893, an interlocutory decree was entered wherein it is "ordered, adjudged and declared by "this court that the boundary line between the State of "Iowa and the State of Illinois is *the middle of the* "*main navigable channel* of the Mississippi River at the "places where the nine bridges mentioned in the plead- "ings cross said river; and it is further ordered that a "commission be appointed to ascertain and designate at "said places the boundary line between the two states, "such commission consisting of three competent persons, "to be named by the court upon the suggestion of coun- "sel, and be required to make a proper examination, and "to delineate upon maps prepared for that purpose the "true line as determined by this Court, and report the "same to the Court for its further action."

On March 6, 1893, a joint request was filed in this court dated January 19, 1893, signed by the Attorney General of the State of Iowa, and the Attorney General of the State of Illinois, requesting the appointment of commissioners to fix the boundary line on the Keokuk and Hamilton bridge, and on the next day an order was entered in accordance with this request, which order also provided that the commissioners should mark the

boundary line at the other eight bridges when requested by either party. These commissioners filed their report in this Court on March 30, 1893, fixing the boundary line at the Keokuk and Hamilton bridge; and on the same day the State of Iowa moved for an order confirming the report. No notice was given to the State of Illinois, by the State of Iowa, that the report had been filed or that any application would be made to confirm any report. On April 10, 1893, an order was entered by this Court which recites that application had been made by the State of Iowa for an order confirming the report and ordering that the report be confirmed; and further ordering that the commissioners proceed to determine and mark the boundary line between said States throughout its extent and report.

The report itself says nothing about the main navigable channel of the river and gives no facts from which can be ascertained the manner in which the boundary line was fixed; it simply finds the boundary line to be 1,041.65 feet east of the center of the draw span of the bridge. It appears, however, from the plat submitted with the report that the commissioners fixed the east bank of the river and the west bank of the river, and then fixed the boundary line midway between these two points irrespective of the location of the main navigable channel. The plat, however, does show the steamboat channel, which is substantially the same thing as the channel of commerce, and it is the channel of commerce because it is and always has been the main, and, in fact, the only navigable channel, usually followed by vessels engaged in the carrying trade.

The petition of the State of Illinois filed with this motion claims that the main navigable channel of the Mis-

sissippi River is near the Iowa shore; that the west line of such channel is near where the pivot pier of said Keokuk and Hamilton bridge now stands and that the said channel extends eastward a distance of about four hundred feet; that the middle of that channel under the decision of this Court is the boundary line between the two states; that this line is at least eight hundred feet west of the line fixed by the said commissioners; that at the point fixed by said commissioners the river is not navigable and never has been navigable in the ordinary stage of water for vessels engaged in the carrying trade upon said river, nor in fact has the portion of said river east of this navigable channel been used by vessels for the purposes of navigation.

The affidavits filed with the petition fully sustain this claim. It appears from these affidavits that prior to the building of the Keokuk and Hamilton bridge the navigable channel of the river at this point extended from a point near the Iowa shore a distance of from four to six hundred feet east; that blasting of rock in or near the channel and the building of the bridge has somewhat changed the location of the channel, but that east of a point six hundred feet east of the Iowa shore the river is not and never has been, at an ordinary stage of water, navigable, nor has any part of it ever been used as a channel by vessels engaged in the carrying trade.

McMath, one of the affiants, has recently made soundings of the river from shore to shore, and has attached to his affidavit a plat showing those soundings; this plat shows that the point fixed by the commissioners as the boundary line between the states is in about the shallowest part of the river—a portion of the river that could not, at an ordinary stage of water be used for the purposes of navigation, even if there were no bridge at that point.

It appears quite clearly from this plat that the deep water of the river is near the Iowa shore. In fact it seems hardly necessary to spend much time over these affidavits, because it is admitted by the original bill in this case that the channel of commerce, the navigable channel usually followed by vessels engaged in the carrying trade, is near the Iowa shore.

The affidavit of J. L. Miller shows that this suit is the continuation or rather the culmination of litigation that has been going on for some years in the State of Illinois between the Keokuk and Hamilton Bridge Company and the State of Illinois and its several municipalities interested in the taxation of the property of the Bridge Company. For some years the Bridge Company has been contesting the amount of taxes levied upon its property in the State of Illinois; one of the points made by the Bridge Company has been that more of the bridge was assessed in Illinois than was actually situated in that state, and the contention of the Bridge Company on this point has been the same as the contention of the State of Iowa in this case, that the boundary line is the middle of the body of the river measuring from shore to shore. Where this bridge crosses the river, the continuity of the surface of the river is broken by Island No. 4, which is near the Illinois main shore, and separated from it by what is called Hamilton Slough. We think it was originally claimed by the Bridge Company that the boundary line should be ascertained by measuring from main shore to main shore. In this case it seems to have been contended by the State of Iowa that the boundary line was to be ascertained by measuring from the west shore of Island No. 4 to the Iowa main shore. The principle, however, is the same in both cases, or, perhaps, we should rather

say, that both of these contentions are opposed to the contention of the State of Illinois that the boundary line is the middle of the main navigable channel.

In 1891 a suit was commenced by the Keokuk and Hamilton Bridge Company against the Collector of Hancock county, Illinois, and the Township Assessor of Montebello Township, asking for an injunction to restrain the collection of the taxes of 1890 levied upon the property of the Bridge Company, and the main issue involved in that case was the location of the boundary line between the two states, the municipal authorities claiming that the boundary line was at the east end of the draw of the bridge, because that was the middle of the main navigable channel, and the bridge company claiming that the boundary line was several hundred feet west of that point, because the boundary line was the middle of the river from shore to shore.

The Circuit Judge allowed the injunction, but upon appeal, this order was reversed, and the Appellate Court, in an opinion, a certified copy of which is included among the papers on this motion, held that the boundary line was at the middle of the channel of commerce, and that the record did not show that the middle line of the channel of commerce where the bridge crosses was east of the east end of the draw.

The court says in regard to the channel:

In *Bridge Co.* v. *County of Dubuque*, 55 Iowa, 558, it is said that "the word channel, when employed in treating subjects connected with the navigation of rivers, indicates the line of the deep water which vessels follow"; and in *Buttenutt* v. *St. Louis Bridge Co.*, 123 Ill., 547–8, our own Supreme Court declared this to be "a very accurate definition of the word 'channel,' as commonly used by river men." And Wheaton says (Sec. 202, p. 301):

"The channel of the Mississippi was remarkably winding, crossing and recrossing perpetually from one side to the other of the general bed of the river."

It is known here that this channel, between Hamilton and Keokuk, was wholly west of the middle line between the main shores, or between the island and the Iowa shore; that its west line was about where the pivot pier now stands, and its width was about 350 feet, which would place the east end of the draw east of its middle line, and clearly in Illinois, if that line is the boundary. The only change in this channel since the bridge was built is its extension westward to the Iowa abutment, which was made by blasting and removing the rock bed. No part of the river east of it was ever used as a channel by vessels engaged in the carrying trade.

Thus the line claimed by appellee to be "the middle "of the river," and therefore the boundary of the state of Illinois, would place the whole of the only navigable channel outside of that state and within the coterminous state of Iowa.

After this decision was rendered, this suit was instituted in this Court, and it appears from the affidavits that it has been carried on largely by and at the expense of the Bridge Company. The decision of this Court was against the contention always made by the Bridge Company, and in favor of the contention made by the State of Illinois, and made by the several municipalities of Illinois in their previous litigation with the Bridge Company. After the decision was rendered and the interlocutory decree entered, the joint request for the appointment of commissioners was made. It appears from the petition of the State of Illinois that this joint request was presented to the Attorney General of Illinois for his signature, by Mr. George Edmonds, who in all the previous litigation had been the attorney for the Bridge Company, and it also appears from the affidavits that the expenses of these commissioners have been paid by the Bridge

Company. They made their report fixing the boundary line at this bridge, but in this report no attempt is made to locate the main navigable channel of the river, nor are any facts stated in the report from which this Court could determine whether or not the commissioners had correctly fixed the boundary line. They simply state baldly, that they have surveyed and fixed the boundary line between Iowa and Illinois, on the Keokuk and Hamilton bridge, and that they find said boundary line is situated one thousand and forty-one and sixty-five hundredths feet east of the center of the draw span. Their plat, however, shows that they knew where the main navigable channel usually followed by steamboats in the carrying trade was located, because on the plat they have marked the steamboat channel.

They have marked on the plat at the place where they have located the boundary line, the word " mid-channel," but it is quite clear that it is so located, not because it is the middle line of any actual channel, but because the commissioners determined that the mid-channel was the line midway between the east and west shores of the river. This is further shown by the affidavits filed with the petition. The affidavit of Miller shows that he had a conversation with John R. Carpenter, one of the commissioners, in which Carpenter stated that, under the decision of this Court, the middle of the navigable channel was not the boundary line, and that while the commissioners could not be very certain what the Court meant by its decision, the commissioners decided that the boundary line should be the middle of the main arm of the river, without any reference to the portion thereof that was used as the channel of navigation.

The affidavit of Waggoner shows that he was told by

Albert Wempner, another of the commissioners, that in fixing the boundary he did not consider that the channel used by boats had anything to do with the matter. It is a curious fact that this same Albert Wempner made an affidavit in the state court in the litigation to which we have referred, in which he stated that before the building of the Keokuk and Hamilton Bridge the only channel in said river at or near the place crossed by said bridge along which vessels in the carrying trade did or could pass was near the Iowa shore, the west line of said channel being where the pivot pier of said bridge now stands, and the east line of said channel at a point between three and four hundred feet east of where said pier now stands; that the above described channel was the only channel at this point that could be or was used for the purpose of commerce in said river, the water east of said channel being too shallow in an ordinary stage of water to be used by vessels engaged in the carrying trade. A certified copy of this affidavit is among the motion papers.

It is quite clear that these commissioners either did not read the decision of this court or the interlocutory decree, or wilfully disregarded them. They were directed to fix the boundary line in the middle of the main navigable channel; their first duty would have been to have located the main navigable channel, and then have fixed the boundary line at the middle thereof. Instead of doing that, they located the east and west shore of the river and fixed the boundary line midway between the two shores, entirely disregarding the decision of the Court which fixes the line at the middle of the main navigable channel in such a way as to preserve to each state the right of navigation in the river.

This report was presented to this Court and applica-

tion was made by the State of Iowa for its confirmation. No notice was ever given to the State of Illinois that any such application would be made, or that the commissioners had made any report. An order was entered confirming such report. The petition of the State of Illinois shows that no notice was given of any application for such an order, and in fact not until after the final adjournment of this Court at its last term did the Attorney General of the State of Illinois learn that a report had been made by said commissioners, and that said report had been confirmed.

This report is not in accordance with the decision of this Court or the interlocutory decree. The commissioners did not fix the boundary line at the Keokuk and Hamilton bridge, in accordance with the directions of this Court. If this were the only point in the river at which the commissioners were to fix the boundary line, the report should be set aside because it is contrary to the decision of this Court.

The order of March 7, 1893, provided that the boundary line at the Keokuk and Hamilton bridge should be fixed and report made, and that afterward the commissioners determine and mark the said state line at the other eight bridges when requested by either party and report the same.

The order entered April 10, 1893, modified the former order. After confirming the report of the commissioners fixing the boundary line at a single point, namely, where the Keokuk and Hamilton bridge crosses the river, the order provides that the commissioners should proceed to determine and mark the boundary line between said states throughout its extent and report thereon to this Court with all convenient speed, and that the order entered

herein on March 7, 1893, be modified in accordance therewith. That order, of course, is interlocutory. It may be modified or entirely set aside, as the Court may see fit. If, however, it is allowed to stand, then the commissioners will proceed to mark the boundary line throughout its entire extent in the same erroneous manner. In the end this Court will be called upon to enter a final decree determining just where the boundary line is, and if such final decree were based upon the report under consideration, and another report locating the boundary line in the same erroneous manner, the final decree of this Court would be inconsistent with its opinion filed in this case and its interlocutory decree.

We do not expect the Court upon this application to determine the exact location of the main navigable channel. It is sufficient to say that the boundary line at the place where the Keokuk and Hamilton bridge crosses the Mississippi river as fixed by the commissioners in their report is not in the middle of the main navigable channel, and therefore does not correctly fix the boundary line at that place. It follows that it should be set aside.

The petition of the State of Illinois prays that either new commissioners be appointed or that this cause be referred to some Circuit court of the United States or a master in chancery thereof, to take proof in regard to the main navigable channel of the Mississippi river and the middle line thereof, and report the same to this court. It seems to us that the latter course is preferable. The facts upon which the tribunal to whom is referred the ascertainment of the boundary line bases its decision, should be preserved and returned in some form to this Court, in order that this Court may test the propriety of such decision. Especially is this true in a matter of so

great importance as the fixing of the boundary line between two states of the Union, which the final decree of this Court will settle forever.

Respectfully submitted.

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